

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

PHIL BREDESEN,)	
Governor of the State of Tennessee)	
)	
Plaintiff/Appellee,)	
)	Case No. M2006-02722-SC-RDM-CV
v.)	DAVIDSON CHANCERY
)	06-2275(III)
TENNESSEE JUDICIAL SELECTION)	
COMMISSION,)	
)	
Defendant,)	
)	
and)	
)	
J. HOUSTON GORDON and)	
GEORGE T. LEWIS,)	
)	
Intervenors/Cross Claimants/)	
Appellants.)	

BRIEF OF JUDICIAL SELECTION COMMISSION

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Statement of Issues

- I. Whether the trial court erred in holding that the Tennessee Human Rights Act does not apply to the Governor when he fills a judicial vacancy.
- II. Whether the trial court erred in holding that the Governor's rejection letter was not an encroachment on the powers assigned to the Judicial Selection Commission.
- III. Did the Chancellor err in restricting the pool of candidates for the third nominee to the current applicants?

Statement of the Case

The Judicial Selection Commission adopts the Statement of the Case as set out in the brief of Intervenor Lewis.

Statement of the Facts

The Judicial Selection Commission adopts the Statement of Facts as set out in the brief of Intervenor Lewis.

Standard of Review

The facts in this record are undisputed. The appeal, therefore, presents a pure question of law, which the Court reviews de novo, without a presumption of correctness. Blair v. West Town Mall, 130 S.W.3d 761 (Tenn. 2004).

Argument

- I. Whether the trial court erred in holding that the Tennessee Human Rights Act does not apply to the Governor when he fills a judicial vacancy.

The Judicial Selection Commission adopts the argument on the Tennessee Human Rights Act set out in Intervenor Lewis' brief in sections I.A. and I.B. 1-8. The Commission, however, does not advocate as exclusive the remedy suggested in the last paragraph of Section I.B.(10).

As additional authority for the argument that the THRA does not contain the exception for policy making employees, the defendant calls the Court's attention to the case of Washington v. Robertson County, 29 S.W.3d 466 (Tenn. 2000). In that case, this Court held that the THRA did not incorporate the requirement in 42 U.S.C. § 1983 that for a municipality to be liable under the civil rights acts its agents must have acted pursuant to a government policy or custom. See Monell v. Department of Soc. Serv. Of N.Y., 98 S. Ct. 2018 (1978).

The Court said:

However, unlike the specific language and history of the federal statute, 42 U.S.C. § 1983, Tennessee's statute, Tenn. Code Ann. § 4-21-701, does not contain language that could be construed to limit a government liability to acts in furtherance of a policy or custom. Since the Act does not specifically address or limit the manner of determining governmental liability, the plain language of the statute must be interpreted to include respondeat superior liability, a doctrine well-established in our common law.

Therefore, as Intervenor Lewis has pointed out, it is the policy of the federal civil rights acts that the Tennessee courts consider in interpreting the THRA and not the

specific applications. Where the plain language of the THRA contradicts the application of the federal acts, the Tennessee act prevails.

In addition, the defendant respectfully contends that the Chancellor's reasoning with respect to the applicability of the THRA conflicts with this Court's opinion in Sanders v. Lanier, 968 S.W.2d 787 (Tenn. 1998). In Sanders, a circuit judge (a state actor) allegedly demoted a county employee for refusing the judge's sexual advances.

This Court said:

[10] The THRA prohibits an employer from discriminating against a person or an individual. *See* Tenn. Code Ann. § 4-21-401(1) stating "[i]t is a discriminatory practice for an employer to ... discriminate against an individual with respect to compensation, terms, conditions or privileges of employment."). "Employer" is defined as including "the state, or any political or civil subdivision thereof, ... or any person acting as an agent of an employer, directly or indirectly." Tenn. Code Ann. § 4-21-102(4). A "person" is defined as including "one (1) or more individuals." By these terms, the definition does not require that the person or individual be an employee of the employer.

[11] The State falls within the THRA's definition of an employer. Judge Lanier allegedly acted, directly or indirectly, as an agent of the State. Judge Lanier's alleged actions against the plaintiff constitute quid pro quo sexual harassment. In *Carr*, we held that an employer is strictly liable for its supervisor's quid pro quo harassment. *Carr*, 955 S.W.2d at 837. Accordingly, Judge Lanier's actions, if proven, may be imputed to the State because the State empowered Judge Lanier with the authority he allegedly abused in an attempt to gain sexual favors.

Thus, the fact that the Governor is not the employer is simply irrelevant. The State is the employer and the State acts through its agents. The Governor is the State's Chief Executive Officer; in making judicial appointments he acts under the direct authority given to him in the Tennessee Plan. If a circuit judge's actions against a county

employee fall within the acts prohibited by Tenn. Code Ann. § 4-21-401(1), it is inescapable that the statute also prohibits the Governor from refusing to consider a person for judicial office solely on the basis of race.

II. Whether the trial court erred in holding that the Governor's rejection letter was not an encroachment on the powers assigned to the Judicial Selection Commission.

1. General Power of Appointment.

The power of election or appointment to office is a political power, not inherently legislative, executive or judicial, and one that may be vested with equal propriety in either of them. Richardson v. Young, 125 S.W. 664 (Tenn. 1909). Our Constitution gives the General Assembly the power to direct how the election of all officers and the filling of all vacancies shall be accomplished. Art. VII § 4. The Tennessee Plan represents the General Assembly's direction with respect to judicial vacancies.

2. The Commission's Role

The General Assembly created the Judicial Selection Commission and placed it in the Judicial branch of government with the charge to "assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee." Tenn. Code Ann. § 17-4-101(a). Beyond that general charge, the discretion of the Commission is remarkably unfettered. Certain persons are disqualified from consideration: (1) a person defeated for election held under the Tennessee Plan is not eligible for renomination to the office for which he/she was defeated until one regular August election has occurred (Tenn. Code Ann. §17-4-110(b)); (2) a person who has served on the judicial selection commission is not eligible to be nominated until two

years have passed after the conclusion of the members' tenure on the commission (Tenn. Code Ann. § 17-4-11); and (3) a person who is a resident of the same grand division where two members of the Supreme Court currently reside is not eligible for nomination to the Supreme Court. Tenn. Code Ann. § 17-4-109(f); Article VI § 2 Tennessee Constitution).

The General Assembly was concerned about diversity. But it addressed the problem by requiring that the Judicial Selection Commission itself reflect the diversity of the state's population with respect to race and gender, Tenn. Code Ann. § 17-4-102(b)(2)(3) (Supp.), and that the speakers make a conscious effort to select a body which reflects a diverse mixture with respect to race, including the dominant ethnic minority population, and gender. (Tenn. Code Ann. § 17-4-102(b)(3) and (d) (Supp.).

3. The Governor's Role

Under the Tennessee Plan, the Governor gets to name the person to fill a judicial vacancy. Tenn. Code Ann. § 17-4-112(a). There is a reference to that role in Tenn. Code Ann. § 17-4-101(a), but no other powers are assigned to the Governor until Tenn. Code Ann. § 17-4-112(a), where he is given the power to select one of the three nominees from the first panel or he can require the Commission to submit another panel. If he rejects the first panel, he must state his reasons for doing so. Id.

The Commission is the sole judge of the qualifications of the applicants for judicial positions. After fulfilling its statutory duty to investigate the qualifications of possible nominees, the commission is required to select three persons "whom the Commission deems best qualified and available to fill the vacancy and certify the names

of the three (3) persons to the governor as nominees for the judicial vacancy.” Tenn. Code Ann. § 17-4-109(e).

It necessarily follows that the Governor cannot specify the qualifications the Commission should consider – even for the laudable purpose of maintaining the desired diversity on the Court.

The Chancellor in her memorandum recognized that the Governor and the Commission “are equals delegated different duties, such that one does not have power or authority over the tasks of the other.” See R.P. 239. But she disposed of the Governor’s July 24 directive that the Commission send a new panel that includes “qualified minority candidates” with a wave of the hand, terming it merely a request and not a peremptory instruction. R. P. 244. The Commission respectfully submits that the request encroached on the powers assigned to the Commission to “select the best qualified persons available for service on the appellate courts of Tennessee.” Tenn. Code Ann. § 17-4-101(a)

III. Did the Chancellor err in restricting the pool of candidates for the third nominee to the current applicants?

As a part of her remedy, the Chancellor ordered that the Commission fill the third slot on the second panel from the pool of applicants on file. (R.P. 248). Obviously, the Chancellor was concerned about the time and expense involved in opening the pool of candidates for the consideration of other individuals. The Commission respectfully contends that the Chancellor’s Order unduly restricts the manner in which the Commission is to perform its statutory duties.

Other than setting out some general rules to guide the Commission’s work, Tenn. Code Ann. § 17-4-109, the Tennessee Plan leaves the basic operating procedures to the

Commission's discretion. The Commission is required to hold one public meeting to allow "any member of the public" to express possible nominees or to express "approval of or objections to any suggested nominee." Tenn. Code Ann. § 17-4-109(a)(2), (b) and (c). Then the Commission may hold such public or private meetings as it deems necessary, make independent investigations, and endeavor to encourage qualified attorneys to accept nomination and agree to serve if appointed. Tenn. Code Ann. § 17-4-109(d).

As a result of the Governor's actions and the Chancellor's ruling in this case, the landscape has changed. Other highly qualified persons might be encouraged to apply if the process were to be opened. Therefore, the Commission respectfully requests that the Court (1) reverse the part of the Chancellor's Order restricting the selection of the third name to the current pool of applicants, and (2) allow the Commission the discretion as to how it will proceed to pick the third nominee.

CERTIFICATE OF SERVICE

This is to certify that I have served the attached Brief of the Judicial Selection Commission via email to the following counsel:

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This 19th day of January, 2007.



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